

Dissenting Views to H.R. 2341, "The Class Action Fairness Act of 2001"

We strongly oppose H.R. 2341, the "Class Action Fairness Act of 2001." Although the legislation is described by its proponents as a simple procedural fix, in actuality it represents a major rewrite of the class action rules that would bar most forms of state class actions. H.R. 2341 (or its predecessor version)¹ is opposed by both the state² and federal³ judiciaries, as well as consumer and public interest groups, including Public Citizen⁴ and Consumers Union.⁵

By providing plaintiffs access to the courts in cases where a defendant may have caused small injuries to a large number of persons, class action procedures have traditionally offered a valuable mechanism for aggregating small claims that otherwise might not warrant individual litigation. This legislation will undercut that important principle by making it far more burdensome, expensive, and time-consuming for groups of injured persons to obtain access to justice. Thus, it would be more difficult to protect our citizens against violations of fraud, consumer health and safety and environmental laws, to name but a few important laws. The legislation goes so far as to prevent state courts from considering class action cases which involve

¹H.R. 2341 is the third time class action legislation has been offered in Congress. During the 105th Congress, the Full Committee marked-up and reported out on a party line vote the "Class Action Jurisdiction Act of 1998," which was also similar in most respects to H.R. 2341. The bill, however, was never considered by the Full House during the 105th Congress. In 1999, after a hearing and mark-up, the House Committee on the Judiciary reported out, by a 15-12 vote, the "Interstate Class Action Jurisdiction Act of 1999," which was similar in most respects to H.R. 2341 under consideration today. On September 23, 1999 the House passed the legislation 22-207. It was never voted on in the Senate.

²See Letter from David A. Brock, President, Conference of Chief Justices (July 19, 1999) (on file with the minority staff of the House Judiciary Committee) [hereinafter Conference of Chief Justices letter] (stating that "H.R. 1875, in its present form, is an unwarranted incursion on the principles of judicial federalism.").

³See Letters from Leonias Ralph Mechem, Secretary, Judicial Conference of the United States (July 26, 1999 & August 23, 1999) (letters on file with the minority staff of the House Judiciary Committee) [hereinafter Judicial Conference letter] (stating that on July 23, 1999, the Executive Committee of the Conference voted to express its opposition to the class action provisions in H.R. 1875).

⁴See Letter from Joan Claybrook, President, Public Citizen (March 5, 2002)(letter on file with minority staff of the House Judiciary Committee).

⁵ See Letter from Sally J. Greenberg, Senior Product Safety Counsel, Consumers Union (March 5, 2002)[hereinafter Consumers Union Letter](letter on file with minority staff of the House Judiciary Committee).

solely violations of state laws, such as state consumer protection laws.

As Consumers Union has written, “This ‘class action reform’ legislation is especially inappropriate and ill-timed right now. With the bankruptcy of Enron leaving many investors and employees of the company with vastly diminished retirement savings, while Enron’s executives sold stock and made millions of dollars months before the stock value plummeted, these investors deserve the right to hold any corporate wrongdoers accountable. This is no time to constrict legal remedies by curtailing access to the courts, including state courts.”⁶

H.R. 2341 provides for the removal of state class action claims to federal court in cases involving violations of state law where any member of the plaintiff class is a citizen of a different state than any defendant.⁷ The only exceptions provided in H.R. 2341 are that federal courts are directed to abstain from hearing a class action where (1) a “substantial majority” of the members of the proposed class are citizens of a single state of which the primary defendants are citizens and the claims asserted will be governed primarily by laws of that state (“an intrastate case”); (2) all matters in controversy do not exceed \$2,000,000 or the membership of the proposed class is less than 100 (“a limited scope case”); or (3) the primary defendants are states, state officials, or other government entities against whom the district court may be foreclosed from ordering relief (“a state action case”).⁸ In the event the district court determines that the action subject to its jurisdiction does not satisfy the requirements of Federal Rule of Procedure 23, under the bill the court must dismiss the action,⁹ which has the effect of striking the class action claim.¹⁰

H.R. 2341 also contains a so-called “Consumer Class Action Bill of Rights.” This includes some nominal safeguards, such as judicial scrutiny of coupon and other noncash

⁶See Consumer Union Letter

⁷H.R. 2341, § 4(a). Current law requires there to be complete diversity before a state law case is eligible for removal to federal court, that is to say that all of the plaintiffs must be citizens residing in different states than all of the defendants. See *Stawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). In *Snyder v. Harris*, 394 U.S. 332 (1969), the Supreme Court held that the court should only consider the citizenship of named plaintiffs for diversity purposes, and not the citizenship of absent class members.

⁸H.R. 2341, § 4(a). The legislation also excludes securities-related and corporate governance class actions from coverage and makes of number of other procedural changes, such as easing the procedural requirements for removing a class action to federal court (*i.e.*, permitting removal to be sought by any plaintiff or defendant and eliminating the one-year deadline for filing removal actions) and tolling the statute of limitation periods for dismissed class actions.

⁹H.R. 2341, § 4(a).

¹⁰While the class action may be refiled again, any such refiled action may be removed again if the district court has original jurisdiction.

settlements, protection against a proposed settlement that would result in a net loss to a class member, protection against discrimination based on geographic location, prohibition on class representatives receiving a greater share of the award and plain English requirements. However, the bill fails to do anything to address the greatest consumer abuse “sweetheart” deals which payoff one class in order to eradicate future claims which were not even before the court.¹¹

H.R. 2341 will damage both the federal and state courts. As a result of Congress’ increasing propensity to federalize state crimes, the federal courts are already facing a dangerous workload crisis. By forcing resource intensive class actions into federal court, H.R. 2341 will further aggravate these problems and cause victims to wait in line for as much as three years or more to obtain a trial. Alternatively, to the extent class actions are remanded to state court, the legislation effectively only permits case-by-case adjudications, potentially draining away precious state court resources. For these and the other reasons set forth herein, we dissent from H.R. 2341.

I. H.R. 2341 Will Damage the Federal and State Court Systems

A. Impact on Federal Courts

Expanding federal class action jurisdiction to include most state class actions, as H.R. 2341 does, will inevitably result in a significant increase in the federal courts’ workload. As the Justice Department observed last Congress, “[c]lass action cases are among the most resource-intensive litigation before the judiciary [and enactment of the bill] could move most of this litigation into the Federal judicial system. Addressing the resulting caseload could require substantial additional Federal resources.”¹²

In actuality, the workload problem in the federal courts continues to be at an acute stage. For example, in 2001, the federal courts faced the following:

¹¹These include collusive settlements, in which the parties agree to a far broader settlement than was originally sought in order to insulate defendants from future liability, and coupon and other deficient settlements which provide little in the way of real relief to plaintiffs. For example, *In re Prudential Insurance Company of America Sales Practice Litigation*, 962 F. Supp. 450 (D. N.J. 1997) (class action based on misrepresentations to customers regarding future premiums for which settlement was approved releasing defendant from any abusive sales practice), involved a class action case which as filed was based only on misrepresentations to customers regarding future premiums, but as settled, released defendants from all claims concerning abusive sales practices.

¹²See Letter from L. Anthony Sutin, Acting Assistant Attorney General, U.S. Department of Justice Office of Legislative Affairs, to the Honorable Howard Coble, Chairman, Subcommittee on Courts and Intellectual Property, House Judiciary Committee 1 (June 18, 1998) (on file with the minority staff of the House Judiciary Committee).

- On February 2, 2002, 68 judicial vacancies existed, or over 10% of the federal judicial positions.¹³

- On average, federal district court judges had 416 civil filings pending.¹⁴

It is because of these and other workload problems that Chief Justice Rehnquist took the important step of criticizing Congress for taking actions which have exacerbated the courts' workload problem:

I also criticized Congress and the president for their propensity to enact more and more legislation which brings more and more cases into the federal court system. This criticism received virtually no public attention. . . . [I]f Congress enacts, and the president signs, new laws allowing more cases to be brought into the federal courts, just filling the vacancies will not be enough. We will need additional judgeships.¹⁵

Further, the Judicial Conference of the United States also has serious reservations regarding this legislation. In a letter last Congress opposing class action legislation, the Judicial Conference stated the following:

While it is difficult to predict with precision the impact that the federalization of class actions will have on the federal judicial system, one can predict with confidence that it will impose a very substantial burden. . . . the federalization of class actions holds the potential for increasing significantly the number of such cases currently being litigated in the federal system.¹⁶

B. Impact on the State Courts

In addition to its impact on the federal courts, the legislation will also undermine state courts. This is because in cases where the federal court chooses not to certify the state class action, the bill prohibits the states from using class actions to resolve the underlying state causes of action. It is important to recall the context in which this legislation arises—a class action has been filed in state court involving numerous state law claims, each of which if filed separately would not be subject to federal jurisdiction (either because the parties are not considered to be

¹³See generally Judicial Nominations, Department of Justice, Office of Legal Policy, *available at* <http://www.usdoj.gov/olp/judicialnominations.htm> (last viewed February 2, 2002).

¹⁴See Admin. Office of the U.S. Courts, Annual Report of the Director of the Administrative Office of the United States Courts (2000).

¹⁵Chief Justice William Rehnquist, An Address to the American Law Institute, *Rehnquist: Is Federalism Dead?* (May 11, 1998), in *Legal Times* (May 18, 1998).

¹⁶See *supra* note 2.

diverse or the amount in controversy for each claim does not exceed \$75,000). When these individual cases are returned to the state courts upon remand, hundreds if not thousands of potential new cases may be unleashed.¹⁷

In addition to these workload problems, the legislation raises constitutional issues. H.R. 2341 does not merely operate to preempt an area of state law, rather it unilaterally strips the state courts of their ability to use the class action procedural device to resolve state law disputes. As the Conference of Chief Justices stated, the legislation in essence “unilaterally transfer[s] jurisdiction of a significant category of cases from state to federal courts” and is a “drastic” distortion and disruption of traditional notions of judicial federalism.¹⁸

In this regard, the courts have previously found that efforts by Congress to dictate such state court procedures implicate important Tenth Amendment federalism issues and should be avoided. For example, in *Felder v. Casey*¹⁹ the Supreme Court observed that it is an “unassailable proposition that States may establish the rules of procedure governing litigation in their own courts.” Similarly in *Johnson v. Fankell*²⁰ the Court reiterated what it termed “the general rule ‘bottomed deeply in belief in the importance of State control of State judicial procedure . . . that Federal law takes State courts as it finds them’”²¹ and observed that judicial respect for the principal of federalism “is at its apex when we confront a claim that Federal law requires a State to undertake something as fundamental as restructuring the operation of its courts” and “it is a

¹⁷To counter this problem, Congressman Berman, Frank, and Meehan offered an amendment at the Judiciary Committee markup that provided that if after removal, the Federal court determines that no aspect of an action that is subject to its jurisdiction may be maintained as a federal class action, the court shall remand the action to the State court without prejudice. This amendment would respond to the most serious complaint leveled by class action defendants by allowing the Federal court the first opportunity of certifying but not denying the State court jurisdiction over the class action if the court determined it did not meet the federal requirement. The amendment was defeated 9 to 14.

¹⁸*See id.*

¹⁹487 U.S. 131, 138 (1988) (finding Wisconsin notice-of-claim statute to be preempted by 42 U.S.C. § 1983, which holds anyone acting under color of law liable for violating constitutional rights of others).

²⁰520 U.S. 911 (1997) (holding that Idaho procedural rules concerning appealability of orders are not preempted by 42 U.S.C. § 1983).

²¹*Id.* at 919 (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)).

matter for each State to decide how to structure its judicial system.”²²

These same constitutional concerns were highlighted by Professor Laurence Tribe in his testimony regarding the constitutionality of a proposed federal class action rule applicable to state courts included in tobacco legislation proposed during the 105th Congress. He observed, “[f]or Congress directly to regulate the procedures used by state courts in adjudicating state-law tort claims -- to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits -- would raise serious questions under the Tenth Amendment and principles of federalism.”²³

Arguments that the bill is nonetheless justified because state courts are “biased” against out of state defendants in class action suits also lacks foundation.²⁴ First, the Supreme Court has already made clear that state courts are constitutionally required to provide due process and other fairness protections to the parties in class action cases. In *Phillips Petroleum Co. v. Shutts*,²⁵ the Supreme Court held that in class action cases, state courts must assure that: (1) the defendant receives notice plus an opportunity to be heard and participate in the litigation;²⁶ (2) an absent plaintiff must be provided with an opportunity to remove himself or herself from the class; (3) the named plaintiff must at all times adequately represent the interests of the absent class members; and (4) the forum state must have a significant relationship to the claims asserted by each member

²²*Id.* at 922. See also *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954) for the proposition that federal law should not alter the operation of the state courts); *New York v. United States*, 505 U.S. 144, 161 (1992) (stating that a law may be struck down on federalism grounds if it “commandeer[s] the legislative processes of the States by directly compelling them to enact and enforce a Federal regulatory program”); *Printz v. United States*, 117 S.Ct. 2365 (1997) (invalidating portions of the Brady Handgun Violence Protection Act requiring local law enforcement officials to conduct background checks on prospective gun purchasers).

²³*The Global Tobacco Settlement: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong., (1997) (statement of Laurence H. Tribe, Tyler Professor of Law, Harvard Law School).

²⁴Of course the entire premise of the argument would need to be based on bias by the judges, since the juries would be derived from citizens of the state where the suit is brought, whether the case is considered in state or federal court.

²⁵472 U.S. 797 (1985).

²⁶The notice must be the “best practicable, reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 812 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)).

of the plaintiff class.²⁷

Secondly, it is important to note that as fears of local court prejudice have subsided and concerns about diverting federal courts from their core responsibilities increased, the policy trend in recent years has been towards *limiting* federal diversity jurisdiction.²⁸ For example, less than six years ago Congress enacted the Federal Courts Improvement Act of 1996,²⁹ which *increased* the amount in controversy requirement needed to remove a diversity case to federal court from \$50,000 to \$75,000. This statutory change was based on the Judicial Conference's determination that fear of local prejudice by state courts was no longer relevant³⁰ and that it was important to keep the federal judiciary's efforts focused on federal issues.³¹ In this same regard, the American Law Institute has found "there is no longer the kind of prejudice against citizens of other states that motivated the creation of diversity jurisdiction,"³² and the most recent Federal Courts Study Committee report on the subject concluded that local bias "is no longer a major threat to litigation fairness" particularly when compared to other types of prejudice that litigants may face, such as

²⁷See *id.* at 806-810. These findings were reiterated by the Supreme Court in 1995 in *Matshusita Elec. Indust. Co. v Epstein*, 516 U.S. 367 (1995) (state class actions entitled to full faith and credit so long as, *inter alia*, the settlement was fair, reasonable, and adequate and in the best interests of the settlement class; notice to the class was in full compliance with due process; and the class representatives fairly and adequately represented class interests).

²⁸Ironically, during the 105th Congress, the Republican Party was extolling the virtues of state courts in the context of their efforts to limit *habeas corpus* rights, which permit individuals to challenge unconstitutional state law convictions in federal court. At that time Chairman Hyde stated:

I simply say the state judge went to the same law school, studied the same law and passed the same bar exam that the Federal judge did. The only difference is the Federal judge was better politically connected and became a Federal judge. But I would suggest ... when the judge raises his hand, State court or Federal court, they swear to defend the U.S. Constitution, and it is wrong, it is unfair to assume, *ipso facto*, that a State judge is going to be less sensitive to the law, less scholarly in his or her decision than a Federal judge.

142 Cong. Rec. H3604. (daily ed. April 18, 1996).

²⁹28 U.S.C. § 1332(a) (West Supp. 1998).

³⁰The Judicial Conference of the United States, Long Range Plan for the Federal Courts, Recommendation 7 at 30 (1995).

³¹*Id.*

³²American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 101, 106 (1996).

on account of religion, race or economic status.³³ Indeed, in 1978, the House twice passed legislation that would have abolished general diversity jurisdiction.³⁴

Thirdly, as the legislation is currently written, it assumes a defendant will be automatically subject to prejudice in any state where the corporation is not formally incorporated (typically Delaware) or maintains its principal place of business. In so doing, it can be said the bill ignores the fact that many large businesses have a substantial commercial presence in more than one state, through factories, business facilities or employees. For example, if General Motors or Ford were to be sued by a class of plaintiffs in Ohio, where they have numerous factories and tens of thousands of employees, it does not seem reasonable to expect the defendants to face any great risk of bias.³⁵ Similarly, if the Disney Corporation, one of Florida's largest employers, were to face a class action brought by a class of plaintiffs in a Florida court, it would make little sense to involve the federal courts of concern of local prejudice.³⁶ Yet under H.R. 2341, both of these hypothetical cases would be subject to removal to federal court.³⁷

³³Federal Courts Study Committee, Report of the Federal Courts Study Committee 40 (April 2, 1990). See also, Ball, *Revision of Federal Diversity Jurisdiction*, 28 Ill. L. Rev. 356 (1988); Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 236-237 (1976); Butler & Eure, *Diversity in the Court System: Let's Abolish It*, 11 Va.B.J. 4, (1995); Coffin, *Judicial Gridlock: The Case for Abolishing Diversity Jurisdiction*, 10 Brookings Rev. 34 (1992); Currie, *The Federal Courts and the American Law Institute*, 36 U. Chi. L. Rev. 1, 1-49 (1968); Feinberg, *Is Diversity Jurisdiction An Idea Whose Time Has Passed?*, N. Y. St. B. J. 14 (1989); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Corn. L. Q. 499 (1928); Frankfurter, *A Note on Diversity Jurisdiction – In Reply to Professor Yntema*, 79 U. Pa. L. Rev. 1097 (1931); Haynsworth, Book Review, 87 Harv. L. Rev. 1082, 1089-1091 (1974); Hunter, *Federal Diversity Jurisdiction: The Unnecessary Precaution*, 46 UMKC L. Rev. 347 (1978); Jackson, *The Supreme Court in the American System of Government*, 38 (1955); Sheran & Isaacman, *State Cases Belong In State Courts*, 12 Creighton L. Rev. 1 (1978).

³⁴See 124 Cong. Rec. 5008 (1978); 124 Cong. Rec. 33, 546 (1978). The legislation was not considered in the Senate.

³⁵General Motors and Ford both have their principal place of business in Michigan and are incorporated in Delaware.

³⁶Disney's corporate headquarters are located in Burbank, California, and it is incorporated in Delaware.

³⁷With increasing frequency, companies are setting up paper companies in places like Bermuda for a nominal fee. The company continues to be owned by the U.S. shareholder and continues to do business in the exact same U.S. locations. This allows the company to escape substantial tax liability and possibly avoid legal liability. To stop this abuse, Representative John Conyers, Jr. offered an amendment at the Judiciary Committee markup, which would allow former U.S. companies to be treated as domestic corporations for class action purposes. This amendment was

It is for these reasons that the State courts believe that the enactment of the legislation goes against the underlying judicial principles of our system of government. Specifically, the Conference of Chief Justices said in a letter opposing a predecessor version of the bill, "So drastic a distortion and disruption of judicial federalism is not justified, absent clear evidence of the inability of the state judicial systems to process and decide class action cases in a fair and impartial manner and in timely fashion."³⁸

II. H.R. 2341 Will Weaken Enforcement of Laws Concerning Consumer Health and Safety, the Environment, and Civil Rights

H.R.2341 will have a serious adverse impact on the ability of consumers and other harmed individuals to obtain compensation in cases involving widespread harm. At a minimum, the legislation will force most state class action claims into federal courts where it is likely to be far more expensive for plaintiffs to litigate cases and where defendants could force plaintiffs to travel long distances to attend proceedings.

It is also likely to be far more difficult and time consuming to certify a class action in federal court. In 1999, fourteen states, representing some 29% of the nation's population,³⁹ adopted different criteria for class action rules than Rule 23 of the federal rules of civil procedure.⁴⁰ In addition, with respect to those states which have enacted a counterpart to Rule 23, the federal courts are likely to represent a far more difficult forum for class certification to occur. This is because, as noted above, in recent years a series of adverse federal precedent, has made it more difficult to establish the predominance requirement of rule 23(b)(3) necessary to establish a class action under the federal rules.

Further, the legislation will inevitably result in substantial delay before civil class action claimants are able to obtain a trial date in federal court. Given the backlog in the federal courts and the fact that the federal courts are obligated to resolve criminal matters on an expedited basis

defeated by voice vote.

³⁸Letter from Chief Justice David A. Brock , President of the Conference of Chief Justices to Congressman Henry J. Hyde, Chairman of the Committee on the Judiciary (July 19, 1999)(on file with the House Judiciary Committee Democratic Staff).

³⁹*See Hearing on H.R. 1875 Before the House Comm. On the Judiciary, 106th Cong.* (1999)(statement of Brian Wolfman, Staff Attorney, Public Citizen)[hereinafter Wolfman testimony](stating "H.R. 1875 is an unwise and ill-considered incursion by the federal government on the jurisdiction of the state courts. It works a radical transformation of judicial authority between the state and federal judiciaries that is not justified by any alleged "crisis" in state-court class action litigation.").

⁴⁰*See supra* note 2.

before civil matters,⁴¹ even where plaintiffs are able to successfully certify a class action in federal court, it will take longer to obtain a trial on the merits than it would in state court.

The legislation also poses unique risks and obstacles for plaintiffs that they do not face under current law. Because the federal courts are required to dismiss cases they choose not to certify, plaintiffs will be foreclosed from forming a reconstituted class in state court upon remand which conforms to the legislation's requirements.⁴²

Consumers may also be disadvantaged by the vague terms used in the legislation. The terms "substantial majority" of plaintiffs, "primary defendants," and claims "primarily" governed by a state's laws⁴³ are new and undefined phrases with no precedent in the United States Code or the case law. It will take many years and conflicting decisions before these critical terms can begin to be sorted out. The vagueness problems will be particularly acute for plaintiffs—if they guess incorrectly regarding the meaning of a particular phrase, their class action could be permanently preempted and barred. However, if a defendant guesses wrong and jurisdiction does not lie in the federal courts, the defendant will be no worse off than they are under present law, and will have benefitted from the additional time delays caused by the failed removal motion.

The legislation goes so far as to federalize all consumer protection actions, regardless of whether or not they involve large classes of nationwide plaintiffs, or even a class of plaintiffs at all. For instance, some states have laws that protect consumers by prohibiting deceptive business practices.⁴⁴ These laws may be enforced by the State Attorney General or, if the State Attorney General does not act, the state citizens may act as a private attorney general. Although such a suit may have been brought by private citizens, this legislation may force the case into federal court because the private citizen also represents the interest of the "general public".⁴⁵

The net result of these various changes is that under the legislation it will be far more difficult for consumers and other harmed individuals to obtain justice in class action cases at the state or federal level. This means, as noted above, it will be far more difficult for consumers to

⁴¹Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1994).

⁴²For example, if certification had been denied by the federal court because a particular conflict among the class members made it impossible to meet the "adequate representation" requirement of Federal Rule of Civil Procedure 23(a)(4), the plaintiffs in the remanded action would likely be prohibited from narrowing the class in an effort to resolve that conflict.

⁴³H.R. 2341 § 4, 107th Cong. (2001).

⁴⁴Michigan and California are two states that have "private attorney general" suits.

⁴⁵H.R. 2341 § 4(a). Representatives Lofgren and Schiff introduced an amendment to address this issue. The amendment limited the bill to affect only consumer class actions. This amendment failed 11 to 17.

bring class actions in state court involving violations of fraud, health and safety laws and environmental laws.⁴⁶

H.R. 2341 also poses unique risks and obstacles for plaintiffs that they do not face under current law. Under H.R. 2341, if the district court determines that the action subject to its jurisdiction does not satisfy the requirements of Federal Rule of Civil Procedure 23, the court must dismiss the action. This has the effect of striking the class action claim and forcing all states to conform to federal class actions standards.⁴⁷ While the class action may be refiled again, any such refiled action may be removed again to federal court. Therefore, even if a state court would subsequently certify the class, it could be removed again, creating a revolving door between federal and state court – hardly a desirable result. As Consumers Union has written about this feature of the bill stating, “This legal ‘ping-pong’ could well deprive consumers of access to their own state courts, and ultimately deny them their day in court through the class action process- in many cases their only effect remedy.”⁴⁸

Consumers will also be disadvantaged by the vague terms used in the legislation. The terms “substantial majority” of plaintiffs, “primary defendants,” and claims “primarily” governed by a state’s laws⁴⁹ are new and undefined phrases with no antecedent in the United States Code or the case law. It will take many years and conflicting decisions before these critical terms can

⁴⁶ For example, in an incident in Washington state, the parent company of Jack-in-the-Box restaurants agreed to pay \$14 million in a class-action settlement. The class included 500 people, mostly children, who became sick in early 1993 after eating undercooked hamburgers tainted with E. coli bacteria. The Washington Superior Court in King County approved the settlement on September 25, 1996.

Another example of a state class action is a recent case in Richmond, California. On July 26, 1993, a railroad tank car filled with Oleum, a sulfuric acid compound, leaked from General Chemical’s Richmond, California plant when a valve malfunctioned during unloading. A cloud of chemicals formed over a heavily-populated community in North Richmond, and over 24,000 people sought medical treatment in the days immediately following the leak. Individual plaintiffs received up to \$3,500 in compensation.

⁴⁷In this regard, it is unfortunate the Majority rejected an amendment offered by Representatives Conyers, Berman and Meehan which would have largely eliminated the federalism problem by amending the bill to simply allow the federal courts the first opportunity of certifying a class action, but not to deny state court jurisdiction over the class action if the court determined it did not meet federal requirements. This would have responded to the most serious complaint leveled by corporate defendants, that class actions encourage a race to the court house by permitting the federal courts to use their powers to consolidate class actions into a single forum in the appropriate circumstances.

⁴⁸See Consumers Union letter.

⁴⁹H.R. 2341, § 4(a).

begin to be sorted out.

The net result is that under the legislation it will be far more difficult for consumers and other harmed individuals to obtain justice in class action cases at the state or federal level. The types of cases affected by this legislation range from consumer fraud and health and safety to environmental and civil rights actions. The following are examples of important class actions previously brought at the state level, but which could have been forced into federal court under H.R. 2341, where the actions may be delayed or rejected:

- In the Baptist Foundation of Arizona case, a mirror image of the Enron scandal, the Foundation issued worthless notes and sold them in many Arizona communities. Approximately 13,00 investors in Baptist Foundation of Arizona case lost millions of dollars in this scheme in “off the books” transactions with sham companies that were controlled by the Foundation and corporate insiders. As it was, the victims were able to bring a successful state class action suit against Arthur Andersen which resulted in a \$217 million settlement. If H.R. 2341 was law, this case would have been forced into federal court because the legislation provides no exemption for state securities claims.⁵⁰
- The proposed legislation would also make it far more difficult to maintain class action cases such as the Firestone/Ford Explorer tire liability case. A lawsuit is currently pending in South Carolina state court against Firestone and Ford charging that the two companies were “negligent and careless” in producing and distributing tires that went on Ford vehicles. On December 28, 2001, the Circuit Court in Greenville, South Carolina certified the lawsuit as a class action, allowing South Carolina residents to join the lawsuit against Firestone and Ford. If the proposed legislation was enacted, this case could automatically be removed from state court to federal court at the election of the defendant and would make it difficult to keep the lawsuit as a class action.
- Foodmaker Inc., a Delaware corporation and the parent company of Jack-in-the-Box restaurants, agreed to pay \$14 million in a state class-action settlement involving a violation of Washington’s negligence law. The class included 500 people, mostly children and Washington residents, who became sick in early 1993 after eating undercooked hamburgers tainted with E. coli 0157:H7 bacteria. The victims suffered from a wide range of illnesses, from more benign sicknesses to those that required kidney dialysis. Three children died.⁵¹
- Equitable Life Assurance Company, an Iowa corporation, agreed to a \$20 million

⁵⁰Craig Harris, *Andersen settles Baptist Suit*, azcentral.com (March 2, 2002), <http://www.arizonarepublic.com>; *Settlement Sum Revives Hope for Baptist Investors: Andersen to pay \$217 million* (March 3, 2002) <http://www.arizonarepublic.com>.

⁵¹ The settlement was approved on 25 September 1996 in King County, Washington Superior Court. “Last Jack in the Box Suit Settled,” *Seattle Times*, October 30, 1997 at B3.

settlement of two class-action lawsuits involving 130,000 persons filed in Pennsylvania and Arizona state courts. The class action alleged that Equitable misled consumers, in violation of state insurance fraud law, when trying to sell “vanishing premium” life insurance policies in the 1980s. Equitable sold the policies when interest rates were high, informing potential customers that after a few years, once the interest generated by their premiums was sufficiently high, their premium obligations would be terminated. However, when interest rates dropped, customers ended up having to continue to pay the premium in full.⁵²

- On July 26, 1993, a California plant operated by General Chemical, a Delaware corporation with offices in New Jersey, erupted leading to a hazardous pollution cloud when a valve malfunctioned during the unloading of a railroad tank car filled with Oleum, a sulfuric acid compound. The cloud settled directly over North Richmond, California, a heavily-populated community, resulting in over 24,000 residents needing medical attention. General Chemical entered into a settlement for violation of California negligence law with 60,000 North Richmond residents who were injured or sought treatment for the effects of the cloud, or were forced to evacuate their homes. Individual plaintiffs received up to \$3,500 in compensation.⁵³
- On April 21 of this year, Nationwide entered into a state class action settlement concerning a redlining discrimination claim with the Toledo, Ohio Fair Housing Center. The lawsuit had been brought in Ohio state court by residents living in Toledo’s predominately black neighborhoods, and charged that Nationwide redlined African-American neighborhoods by discouraging homeowners in minority neighborhoods from buying insurance and by denying coverage to houses under a certain value or a certain age. As a result of the settlement, Nationwide agreed to modify its underwriting criteria, increase its agency presence, step up its marketing in Toledo’s black neighborhoods. Nationwide also agreed to place up to \$2 million in an interest-bearing account to provide compensation to qualified class members, and agreed to deposit \$500,000 with a bank willing to offer low-interest loans to residents buying homes in Toledo’s black neighborhoods.⁵⁴
- Under current law, class action claims against managed care must often distinguish

⁵²See David Elbert, “Lawsuits to Cost Equitable \$20 Mill,” *Des Moines Register*, July 19, 1997 at 12 and “Cost of Settling Lawsuits Pulls Equitable Earnings Down,” *Des Moines Register*, August 6, 1997 at 10.

⁵³See Mealey’s Litigation Reports: *Toxic Torts, \$180 Million Settlement of Toxic Cloud Claims Wins Judges O.K.*, November 17, 1995 at 8.

⁵⁴See Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co., No CI93-1685, Ohio Comm. Pls, Lucas County; see also “Nationwide and Ohio Fairhousing Announce Attempt to Settle Class Action,” *Mealey’s Insurance Law Weekly*, April 27, 1998 at 3.

between ERISA and non-ERISA patients. Non-ERISA patients have a full range of remedies available to them under state law. On the other hand, ERISA patients have a very limited set of remedies—the cost of the benefit denied, which in most cases is woefully inadequate. The managed care reform debate in Congress includes the elimination of the ERISA preemption which would allow patients who receive their health care from their employer to hold their HMO accountable if it denies care. However, legislation such as H.R. 2341 would move in the opposite direction by enacting legislation which would deny more patients access to justice in state court.⁵⁵ Moreover, the House passed the Patients Bill of Rights legislation, H.R. 2653, which contained severe restrictions on class actions against HMO's such as limiting class action lawsuits under ERISA and RICO to participants in a group health plan established by a sign plan sponsor. This restriction was contained in the Norwood Amendment to the Patients Bill of Rights.

- The regulation of funeral homes, cemeteries and crematoria should remain an issue best handled by state courts. However, federalizing of such class actions under this bill likely would force these families to travel untold miles from their homes – in some cases into entirely different states – just to exercise their legal rights. For example, the largest operator of funeral homes in the United States is the defendant in a state class action in Florida accuses Services Corporation International, a Texas Corporation and owner of Menorah Gardens, of breaking open burial vaults and dumping the remains in a wooded area, crushing vaults to make room for others, mixing body parts from different individuals, and digging up and reburying remains in locations other than the plots purchased.⁵⁶ Similarly, in Georgia, Tri-State Crematory failed to cremate bodies and return remains to loved ones. Although the issues raised in this class action are clearly state issues, such a class action would be removable to federal court under H.R. 2341.

Conclusion

H.R. 2341 will remove class actions involving state law issues from state courts -- the forum most convenient for victims of wrongdoing to litigate and most familiar with the substantive law involved -- to the federal courts -- where the class is less likely to be certified and

⁵⁵One example is *Kaitlin v. Tremoglie, et al.*, No. 002703 (Pa. Comm. Pls., Philadelphia Co. 1997). On June 23, 1997, Harold Kaitlin filed a class action in Pennsylvania State court against his psychiatrist, David Tremoglie, and Keystone Health Plan East Inc., his HMO, alleging that the psychiatrist had treated hundreds of patients without a medical license. The case was filed on behalf of himself and all other patients treated by Tremoglie at the Bustleton Guidance Center. The suit alleges that the class was treated by an unlicensed and fraudulent psychiatrist who unlawfully prescribed powerful medications not suitable for their illness and that the HMO failed to verify that Tremoglie was a licensed psychiatrist, failed to supervise him, and referred patients to him.

⁵⁶ Joel Engelhardt, *State Seeks Control of Menorah Gardens*, The Palm Beach Post, March 2, 2002 at 1A.

the case will take longer to resolve. In our view, this incursion into state court prerogatives is no less dangerous to the public than many of the radical forms of “tort reform” and “court stripping” legislation previously rejected by the Congress.

Contrary to supporters’ assertions, H.R. 2341 will not serve to prevent state courts from unfairly certifying class actions without granting defendants an opportunity to respond. This is already barred by the Constitution,⁵⁷ and the few state trial court decisions to the contrary have been overturned.⁵⁸ H.R. 2341 also cannot be seen as merely prohibiting nationwide class actions filed in state court. The legislation goes much further and bars state class actions filed solely on behalf of residents of a single state, which solely involve matters of that state’s law, so long as one plaintiff resides in a different state than one defendant -- an extreme and distorted definition of diversity which does not apply in any other legal proceeding.

This legislation would seriously undermine the delicate balance between our federal and state courts. At the same time it would threaten to overwhelm federal courts by causing the removal of resource intensive state class action cases to federal district courts, it also will increase the burdens on state courts as class actions rejected by federal courts metamorphasize into numerous additional individual state actions. We therefore strongly oppose H.R. 2341.

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⁵⁷See *supra* notes 26-28 and accompanying text.

⁵⁸See Ex Parte State Mut. Ins. Co., 715 So.2d 207 (Ala. 1997); Ex Parte Am. Bankers Life Assurance Co. of Florida, 715 So.2d 207 (Ala. 1997) (holding that classes may not be certified without notice and a full opportunity for defendants to respond and that the class certification criteria must be rigorously applied).